RE WEE KOK TIONG, EX P OCBC BANK (MALAYSIA) BHD

HIGH COURT MALAYA, KOTA BHARU
IDRIS YUSOFF J
[BANKRUPTCY NO: 29-668-1994]
20 NOVEMBER 2000

BANKRUPTCY: *Petition - Reinstatement - Whether leave of court required - Bankruptcy Act 1967, s. 92*

BANKRUPTCY: *Petition - Order to "strike out" petition - Whether proper - Whether order should read as "dismissed" - Whether s. 92 Bankruptcy Act 1967 includes an order striking out creditor's petition - BBMB Factoring Berhad v. Mariam Sasiman (and Another Appeal)*

BANKRUPTCY: *Receiving and adjudication orders - Application to set aside - Issues raised in support of application - Whether should have been raised at hearing of creditor's petition or at reinstatement thereof - Whether doctrine of res judicata applicable*

The creditor's petition ('CP') filed by the judgment creditor ('JC') against the judgment debtor ('JD') was first struck out by the SAR upon the absence of the JC's counsel at the hearing of the CP. Subsequently, the petition was reinstated upon the application by the JC and was struck out again by the SAR upon the failure of the JC's counsel to attend court at its hearing. The JC's counsel claimed that he had not received the court's letter notifying the new hearing date. The JC applied again for reinstatement but this time it was dismissed by the SAR. The JC then appealed to the judge in chambers who set aside the order of the SAR and directed a new hearing date be given for the second application for reinstatement. At the hearing of the said application the CP was reinstated which eventually led to receiving and adjudication ('R&O') orders made against the JD. The JD appealed against the R&O orders made against him but the SAR dismissed the appeal. Hence, this appeal by the JD against the SAR's dismissal of his said application.

The issues, *inter alia*, were: (1) whether the applications for reinstatement of the creditor's petition on both occasions should have been made with leave of court; and (2) whether the SAR should have dismissed the CP instead of striking out as neither the Bankruptcy Act 1967 ('the Act') or Bankruptcy Rules 1969 ('the Rules') used the words "strike out".

Held:

[1] An appeal to the judge in chambers takes the form of an actual rehearing and the judge treats the matter as though it comes before him for the first time. The judge is therefore not confined to the points taken before the

registrar so that the rule about new points being generally open to an appellant to take on appeal does not apply.

[2] The JD could and should have raised the issues that were canvassed in the instant appeal either at the hearing of the second application for reinstatement or at the hearing of the CP. Likewise no appeal was filed against the order of the judge that was made in chambers despite the fact that r. 19(2) of the Rules provided for such an eventuality. If the court were to allow the appeal at this stage, it would tantamount to the court reversing the order made by the said judge which the court had no jurisdiction to do.

[3] The issues of the legality of the SAR's orders for striking out and the requirements for leave of court for reinstatement of the creditor's petition has been put to rest following the case of *BBMB Factoring Berhad v. Mariam Sasiman (and Another Appeal)* wherein it was held that: (i) s. 92(1) of the Act includes an order dismissing or striking out a creditor's petition; and (ii) a creditor's petition dismissed or struck out on the grounds of absence of JC/counsel may be reinstated under s. 92(1) of the Act. If that fails or if the creditor does not wish for reinstatement, a fresh petition may be presented against the debtor but with leave of court on the same act of bankruptcy.

[4] In the circumstances of this case, the doctrine of *res judicata* clearly applied and the issue as canvassed at this stage was clearly an abuse of the process of the court.

[Appeal dismissed.]

Case(s) referred to:

Asia Commerical Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 ***(refd)***

BBMB Factoring Berhad v. Mariam Sasiman (and Another Appeal) [2000] 3 CLJ 639 ***(refd)***

Blundell v. Rimmer [1971] All ER 1072 ***(refd)***

Government of Malaysia v. Dato Chong Kok Lim [1973] 2 MLJ 74 ***(refd)***

Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 ***(foll)***

Hj Abdul Rahman v. Arab Malaysia Finance [1996] 1 MLJ 30 ***(refd)***

Kekatong Sdn Bhd v. Bank Bumiputra (M) Bhd [1998] 2 MLJ 440 ***(refd)***

Scotch Leasing Sdn Bhd (In receivership) v. Chee Pok Choy & Ors [1997] 2 CLJ 58 ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 92(1)

Bankruptcy Rules 1969, rr. 19(2), 111, 120

Rules of the High Court 1980, O. 56 r. 1(3A)

For the judgment debtor - C Jegathesan; M/s C Jegathesan
For the judgment creditor - Elaine Ong; M/s Shook Lin & Bok

Reported by Usha Thiagarajah

JUDGMENT

Idris Yusoff J:

On 18 March 1998 the deputy registrar of the High Court, Kota Bharu dismissed with no costs the summons-in-chambers dated 24 June 1997 filed by the bankrupt (JD) to annul the adjudication and receiving orders issued by senior assistant registrar on 11 June 1997. Being dissatisfied with the said decision the bankrupt now appeals to the judge in chambers.

To have a better understanding of this case and place the facts in proper perspective, it will be helpful if they be set out in chronological order.

Chronology Of Events

Date	Event
31 May 1994	Judgment creditor (JC) obtained judgment against judgment debtor (JD) in KL sessions court.
6 September 1994	JC filed request for bankruptcy notice in Kota Bharu High Court.
9 November 1994	JD was served with the BN by way of personal service.
17 November 1994	JD committed an act of bankruptcy.
29 December 1994	JC filed creditor's petition ("CP') in respect of the abovementioned act of bankruptcy.
16 March 1995	CP served on JD by way of personal service.
23 August 1995	Hearing of CP. CP was struck out by senior assistant registrar because JC's counsel was late as the flight from KL to Kota Bahru was delayed
3 September 1995	JC filed summons in chambers (1st SIC) to reinstate CP for hearing. Affidavits affirmed by Kenneth St James and Azlan bin Shahrim on 30 August 1995 in support of 1st SIC. SAR on 5 September 1995, granted order in terms of 1st SIC. Presence of counsel was dispensed with. (JC's solicitors received sealed copy of 1st SIC through court's letter dated 25 September 1995). Therefore, CP was reinstated and new hearing date for CP to be fixed.

26 September 1995	JC's solicitors wrote to court for new hearing date of CP.
2 October 1995	JC's solicitors wrote to court for new hearing date of CP.
15 November 1995	JC's solicitors wrote to court for new hearing date of CP.
28 December 1995	JC's solicitors wrote to court for new hearing date of CP.
13 January 1996	JC's counsel inquired the High Court clerk by telephone as to why hearing date of CP was still not fixed. Court clerk informed JC's counsel that hearing of CP was on 13 December 1995 and CP was struck out on the said date.
23 January 1996	JC's solicitors immediately filed summons in chambers (2nd SIC) to reinstate CP together with the affidavit in support affirmed by Kenneth St James on 15 January 1996.
26 February 1996	JC's solicitors received letter dated 30 January 1996 from SAR enclosing a copy of the sealed 2nd SIC and stating that the application in 2nd SIC was dismissed and gave the reasons in the said letter. Once again, counsel's presence was dispensed with.
19 March 1996	JC's solicitors filed summons in chambers (the 3rd SIC) and notice of motion to set aside order of SAR made on 23 January 1996 together with affidavit in support affirmed by Kenneth St James on 8 March 1996.
29 October 1996	3rd SIC was heard by the judge and only the first prayer of 3rd SIC was granted and SAR's order made on 23 January 1996 was set aside. Court directed that a new hearing date be given for the 2nd SIC. Notice of motion filed was withdrawn.
4 February 1997	2nd SIC and affidavit in support affirmed by Kenneth St James on 15 January 1996 were served on JD by registered post. JD was also informed that the new hearing date was 12 March 1997.
12 March 1997	Hearing of 2nd SIC - JD was represented by counsel Mr. C. Jegathesan, order in terms of 2nd SIC as no objection was raised by counsel. CP was reinstated. New hearing date for CP was fixed with agreement of counsel.

11 June 1997	Hearing of CP. Receiving and adjudication orders (hereinafter referred to as "the RO and AO") made against JD - Counsel for JD did not raise any objection.
24 June 1997	JD filed application to annul RO and AO.
14 January 1998	Hearing of JD's application to annul RO and AO.
18 March 1998	SAR delivered decision - dismissed JD's application to annul RO and AO with no order as to costs.
19 March 1998	JD filed appeal against SAR's decision.
15 June 1998	Hearing of JD's appeal. Parties ordered to file written submissions.

In the affidavit-in-support of the summons-in-chambers to annul the adjudication order the bankrupt raised certain complaints in regard to the method adopted by the judgment creditor when applying for reinstatement of the creditor's petition especially without he being served with the applications – they being made by way of *ex parte* applications. However it seems to me the principal ground of the complaint is the failure of the judgment creditor to obtain leave of court under r. 120 of Bankruptcy Rules whenever the application for reinstatement was filed.

The law is settled that an appeal to the judge in chambers takes the form of "an actual rehearing and the judge treats the matter as though it comes before him for the first time. The judge is therefore not confined to the points taken before the registrar so that the rule about new points being not generally open to an appellant to take on appeal does not apply". See *Hj Abdul Rahman v. Arab Malaysia Finance* [1996] 1 MLJ 30 (FC) and *Blundell v. Rimmer* [1971] All ER 1072, and see also O. 56 r. 1(3A) of the Rules of the High Court which says:

> (3A) At the hearing of the appeal fresh evidence shall not be admitted unless the Judge is satisfied that:
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> (a) at the hearing before the Registrar the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and
>
> (b) the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the Registrar.

In consequence thereof counsel for JD refers to encl. (10) in the file which purports to be an affidavit of service on the JD of creditors petition dated 12 December 1994 (CP). It seems that the JD duly acknowledged receipt

thereof by signing on the CP which was thereby exhibited. However, the said CP was not a sealed copy and thus, as submitted by counsel, is contrary to r. 111 of the Bankruptcy Rules 1969 which says:

> 111. Proof of service
>
> (1) Service of the petition shall be proved by affidavit
>
> (2) The affidavit with a sealed copy of the petition annexed and referred to as an exhibit shall be filed in Court forthwith after service.

On the issue of non validity of service of CP as alleged by JD's counsel, counsel for JC submits that the copy of CP exhibited to the affidavit of service bears the rubber stamp impression of "LS" which was placed by the court. Moreover no where in the affidavit of JD was it stated that he was not served with CP and if at all he was mindful of pursuing this issue he should have raised it at a proper time and followed with an appeal if the need arose but he chose not to do so and should therefore bear the consequences of his neglect. Whatever may be the case the order made by the SAR was not prejudicial to the JD as the CP was struck out on the date of its hearing in view of the absence of JC's counsel. In this connection I would refer to the case of *Kekatong Sdn Bhd v. Bank Bumiputra (M) Bhd* [1998] 2 CLJ 266 (CA) where Gopal Sri Ram, when delivering the judgment of the court said at p. 276 as follows:

> It is axiomatic that the object of service of process 'is to bring the proceedings to the notice of the person being served, and there must be reasonable probability this object will be achieved ...

Counsel for JD also refers to encl. (17), which was an application by JC dated 5 September 1995 to reinstate the CP which was struck out on 23 August 1995 (1st SIC). Counsel contends that the application was made *ex parte* and dealt with as an *ex parte* hearing on 23 August 1995 - the attendance of the JC or his counsel was dispensed with - and the court made an order in terms of the application and a new date for hearing was to be fixed. It does appear that the 1st SIC was treated by the court as an *ex parte* application and following practice directions No. 10/87 the senior assistant registrar (SAR) acted as therein directed and accordingly dispensed with the attendance of counsel. Counsel for JC received the sealed copy of the 1st SIC through the court's letter dated 25 September 1995 and thus it was a futile effort for the JC to serve it on JD. The CP having been reinstated was fixed for hearing on 13 December 1995 but again on that date JC's counsel failed to appear for reasons that he had not received the court's letter dated 8 November 1995 notifying the new date of hearing. However, the CF was struck out again for the second time.

When told of the order made by the SAR, counsel promptly applied by way of SIC dated 23 January 1996 (2nd SIC) for reinstatement again of the CF which was struck out on 13 December 1995. The 2nd SIC suffered the same fate as the first one as apparently the 2nd SIC was again treated as an *ex parte* application by SAR and was fixed for hearing on the day of its issue (*ie*, 23 January 1996). The reason given by SAR for the dismissal was that he was unable to accept the reasons advanced by JC's counsel on his failure to attend court on 13 December 1995. The SAR's decision was conveyed to JC's counsel through a letter dated 30 January 1996.

On 28 February 1996 JC's counsel wrote to SAR intimating his dissatisfaction over the procedure adopted by the latter in disposing of the 2nd SIC particularly when he was not given a chance to address the court on the merits of the application. The reply from SAR was that the explanation given in the letter of 28 February 1996 could not be accepted and advised JC's counsel to file an appeal to judge in chambers. This was so done by the JC's counsel in the form of summons in chambers dated 19 March 1996 (3rd SIC) with an affidavit in support thereof which was marked as encl. (43). Summons in chambers in encl. (43) prayed for the following orders:

(a) that the Order made by the Senior Assistant Registrar dated 23.1.1996 be set aside;

(b) that the Creditor's Petition herein dated 12.12.1994 be reinstated; and

(c) that a new date be given for the hearing of the said Creditor's Petition; or alternatively;

(d) that an extension of time of seven (7) days from the date of the order hereof be granted to the Judgment Creditor to file a Notice of Appeal to the learned Judge in Chambers against the Order made by the Senior Assistant Registrar dated 23 January 1996.

No date was fixed for hearing of the 3rd SIC as SAR felt that it should be done by way of notice of motion since one of the prayers involved the question of extension of time for filing an appeal to judge in chambers. However JC's counsel felt that it should be by way of SIC in view of r. 18 of the Bankruptcy Rules but however, in deference to SAR's direction a notice of motion to that effect was filed by the JC's counsel with the necessary affidavit in support and was marked as encl. (47).

It is noted, however, that on 29 October 1996 the 3rd SIC was heard by the judge in chambers by way of *ex parte* hearing and accordingly granted prayer (a) thereof i.e. the order of SAR made on 23 January 1996 be set aside and directed that the said SIC (the 2nd SIC) be restored to the hearing list and a date to be given for its hearing, Following the said order the notice of motion

was withdrawn by the JC's counsel and subsequently the 2nd SIC together with the affidavit in support thereof was served on JD by A.R. Registered letter dated 4 February 1997 and he was also informed of the new date of hearing.

On 12 March 1997 the 2nd SIC was heard by SAR in the presence of counsel for both JC and JD and an order for reinstatement of CP dated 12 December 1994 was made upon no objection being raised by JD's counsel and the CP was fixed for hearing on 11 June 1997 with the consent of JD's counsel.

On 11 June 1997 there was an *inter parte* hearing for the CP and counsel for both parties were present whereby receiving and adjudication orders were made though JD's counsel informed the court that there was an auction on a piece of land but this was pointed out by JC's counsel that the auction had nothing to do with the final judgment giving rise to this bankruptcy proceedings. It appears that no appeal was filed against the orders granted by SAR when, quite understandably, no objections was raised by JD's counsel at the time when the said orders were made, For my part, if the JD was mindful of raising the issues that are being canvassed in the instant appeal, he could and should have done so either at the hearing of the 2nd SIC or at the hearing of the CP. Likewise, no appeal was filed against the order of the judge made at an *ex parte* hearing on 29 October 1996 despite that there is a provision in the Bankruptcy Rules 1969 which provides for such eventuality - see r. 19(2). On 24 June 1997 JD filed an application to annul the receiving and adjudication orders and as indicated earlier the application was dismissed with no order as to costs on 18 March 1998.

It does appear that if, at this stage, the court were to allow the appeal it would be tantamount to a certain extent that the court reverses the order of the judge made in chambers on 29 October 1996 which the court clearly has no jurisdiction to do so.

Now that the JD chose not to raise those issues earlier or not to file the appeal against the orders made at the appropriate stage he cannot now be heard to complain of any impropriety, procedural or otherwise that are alleged to have occurred. To this end JC's counsel submits that JD cannot be allowed to do so as the doctrine of *res judicata* has set in. He relies on the following authorities which explained the circumstances under which the doctrine applies:

1. *Asia Commerical Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 - a decision of Supreme Court.

2. *Scotch Leasing Sdn Bhd (In receivership) v. Chee Pok Choy & Ors* [1997] 2 CLJ 58 - also a decision of the Supreme Court.

3. *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104 - a decision of the Court of Appeal.

I would especially refer to the 3rd authority namely *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* wherein the Court of Appeal referred with approval the judgment of Sharma J in *Government of Malaysia v. Dato Chong Kok Lim* [1973] 2 MLJ 74 and at p. 76 Sharma J said:

> The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res* is *judicata*, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter - whether on a question of fact or a question of law - has been decided between two parties in one suit or proceeding and the decision is final, either **because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies**, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again ... (emphasis added)

The Court of Appeal remarked that:

> A decision given by a Court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit. ... Parties cannot raise a second time in the suit an issue that has already been determined either expressly or by necessary implication.

Counsel for JD also refers to the several orders of SAR striking out the CP for want of attendance of JC or counsel. He says that neither the Bankruptcy Act nor the Bankruptcy Rules used the words "strike out". The word used when circumstances permit is "dismissed". Moreover as the act of bankruptcy is deliberately intended to be of a "draconian nature compliance with the Act and the Rules thereunder is to be stridently adhered to". He therefore submits that the applications to reinstate the CP were stealthy attempts to revive a dead letter in defiance of r. 120 of Bankruptcy Rules which reads:

> 120. Non-appearance of creditor
>
> If any creditor neglects to appear on his petition no subsequent petition against the same debtor or debtors or any of them either alone or jointly with any other person shall be presented by the same creditor in respect of the same act of bankruptcy without the leave of the Court.

Thus counsel adds that one can neither haphazardly revive the dead petition nor can one with equal brashness file fresh petition without obtaining prior leave of the court. Subsequent petition in its lateral sense must be taken to mean a petition either than the one that has ceased to exist within the meaning and context of Bankruptcy Act and the Rules therein. Counsel for JC in reply submits that the applications for reinstatement do not in any respect constitute

presenting fresh petitions for if the applications were allowed the same CP which was founded on the very same act of bankruptcy by the JD was revived - hence r. 120 does not apply. However the issues of the legality of the orders for striking out and the requirements for leave under r. 120 had been put to rest following the decision of the Court Appeal in *BBMB Factoring Berhad v. Mariam Sasiman & Another Appeal* [2000] 3 AMR 3127 and at p. 3129 it was held:

> 1(a) The language of s. 92(1) of the Bankruptcy Act 1967 (the Act) indicated Parliament's intention to confer an untrammelled discretion upon a bankruptcy court. Given the words "any order" in the section, the jurisdiction under s. 92(1) applies to any order made by a bankruptcy court, which must also include an order dismissing or striking out a creditor's petition.
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> (b) A creditor whose petition has been dismissed or struck out on the grounds of his absence has two courses open to him. He may apply under s. 92(1) of the Act to have his petition reinstated for hearing. If he fails in his application, or if he does not wish to have his petition reinstated, he may present a fresh petition against the debtor. However, if he wants to adopt the latter course, he must, if relying upon the same act of bankruptcy, obtain leave of the court before presenting a fresh petition.

In view of the foregoing I hold that in the circumstances of this case the doctrine of *res judicata* clearly applies and the issue as canvassed at this stage is clearly an abuse of the process of the court. I therefore dismiss the appeal with costs.